17-433

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~510~~ 223

RICHARD S. ALLEN, PLAINTIFF IN ERROR,

vs.

WILLIAM N. McVEIGH.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

FILED MAY 11, 1880.

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1 VIRGINIA:

Pleas before the supreme court of appeals of Virginia, held at the State court-house, in the city of Richmond, on Monday, March 29th, 1880.

A petition of Richard S. Allen, for a writ of error to a judgment rendered by the corporation court of the city of Alexandria, on the 13th day of July, 1878, in a suit in which the petitioner was plaintiff, and James H. McVeigh and William N. McVeigh were defendants, having been maturely considered and the transcript of the record of the judgment aforesaid seen and inspected, the court being of the opinion that the said judgment is clearly right, doth deny the said writ;

Which petition is in the words and figures following:

Petition.

To the supreme court of appeals of Virginia:

The petitioner, Richard S. Allen, complains that he is aggrieved by a judgment of the corporation court for the city of Alexandria, rendered on the 13th day of July, 1878, in a certain action of debt, in which the petitioner is plaintiff, and James H. McVeigh and William N. McVeigh are defendants.

It will be seen from the accompanying transcript of the record that this is an action of debt on two protested negotiable notes, made
2 by James H. McVeigh and Son, and endorsed by William N. McVeigh; discounted by the Exchange Bank of Virginia, at Alexandria; duly protested at maturety; and notices of protest left at the residence of the endorser in Alexandria, with his white servant in charge of said residence, on the days of protest respectively.

The defendant endorser relied upon the defence of want of notice.

On the first trial the plaintiffs prayed three instructions, which were granted, and the defendants prayed three instructions, which were refused.

The defendants excepted to these rulings of the court. There was verdict and judgment for the plaintiff.

The defendants were awarded a writ of error to the judgment.

The court reversed the judgment, and awarded a new trial.

From the report of this case, in 29 Gratt., 588, it will be seen that this court held that there was no error in the refusal to grant the instructions prayed by the defendants, but that there was error in granting the 2d & 3rd instructions prayed by the plaintiff.

Staples, J., who delivered the opinion of the court, gives as the reason for reversal that the instructions excluded from the jury all the evidence in the cause which was not applicable to the facts con-
3 tained in the instructions. After stating that for this error the judgment should be reversed and a new trial awarded, he proceeds to state that the instructions were erroneous upon another ground, not necessary to be mentioned in this case.

At the second trial the plaintiff prayed five instructions (see record, page 27), which the court refused to give, and the defendants prayed one instruction, which was given to the said rulings in refusing and granting; the plaintiff excepted.

There was a verdict in favor of defendants. The plaintiff moved for a new trial on the ground of the errors, in reference to the instructions, and upon the further ground that the verdict was contrary to the evidence.

This motion was overruled; the plaintiff excepted, and judgment was entered for the defendants.

To this judgment the petitioner prays a writ of error and supersedeas, and makes the following assignments of error.

First. The corporation court erred in refusing the instructions prayed by the plaintiff. The first instruction, which refers to the note protested on the 2nd day of August, 1861, invokes the legal ques-
4 tion as to whether or not the proclamations of the President, issued respectively the 15th and 19th of April, 1861, made intercourse between the bank at Alexandria and the endorser, temporarily sojourning in Culpeper County, unlawful so as to relieve the bank from the obligation of leaving notice of protest of the note at the residence of the endorser in Alexandria on the day of protest, or to prevent the endorser from being at his residence to receive that notice.

The Supreme Court of the United States, in the case of Mathews vs. McSted, 20 Wall., 646, decided that this was a Federal question, and in the same case, 91 U. S., 7, decided that these proclamations did not prohibit intercourse between the hostile sections.

The second instruction, in addition to the legal effect of the said proclamations, involved the question of the effect of the Virginia ordinance of secession upon the lawfulness of intercourse, and the respective duties of the holder and endorser of the notes.

The third instruction relates to the fact that the endorser had not changed his residence.

The fourth instruction relates to the validity of the Virginia ordinance of secession and its effect upon the contract.

The fifth instruction lays down the law of domicile.

All these instructions state the law applicable to the facts proved, and ought to have been given by the corporation court.

Without a detailed reference to these instructions, it is deemed nec-
essary only to refer to the authorities relied upon as sustaining
5 the right of the plaintiff to the granting of them.

Mathews vs. McSted, 91 U. S., 7.
Ludlow vs. Rannay, 11 Wall., 581.
Mitchell vs. U. S., 21 Wall., 350.
Bond vs. Moore, 93 U. S., 593.
Williams vs. Bruffy, 96 U. S., 176.

Second. The corporation court erred in granting the instruction prayed by the defendants, because there was no evidence to prove the two main facts upon which the instruction was based, to wit, the fact that the officers of the Exchange Bank knew of the absence of McVeigh or the nature and duration of it; and there was no evidence whatever to prove that actual intercourse was cut off or prevented.

Thirdly. The corporation court erred in denying the motion for a new trial on the ground that the verdict was contrary to the evidence.

For the foregoing reasons, the petitioner prays for a writ of error and supersedeas to the judgment complained of.

RICHARD S. ALLEN,
By his att'y, H. O. CLAUGHTON.

I, H. O. Claughton, an attorney practicing in the supreme court of appeals of Virginia, do certify that I am of the opinion that this error in the judgment complained of in the foregoing petition, and the same ought to be reviewed and reversed.

March 22, 1880.

H. O. CLAUGHTON.

The following is a transcript of the record referred to and filed with the foregoing petition:

6 VIRGINIA:

RICHARD S. ALLEN
vs.
J. H. MCVEIGH & SON ET AL. } In debt.

Pleas at the court-house of the city of Alexandria, before the corporation court of said city, on the 13th day of July, 1878.

Be it remembered that heretofore, to wit, on the 26th day of July, 1871, came the plaintiff by his attorney, and sued out of the clerk's office of the said corporation court a summons against James H. McVeigh and Edgar McVeigh, late copartners, trading under the firm-name of J. H. McVeigh & Son, and William N. McVeigh, which summons, with the endorsements and return thereon made, is in the words and figures following, to wit:

The commonwealth of Virginia to the sergeant of the city of Alexandria, greeting:

We command you to summon James H. McVeigh & Edgar McVeigh, late copartners, trading under the firm-name of J. H. McVeigh & Son, and William N. McVeigh, if they be found within your bailewick, to appear at the clerk's office of our corporation court for our said city of Alexandria, at the rules to be holden for said court on the first Monday in September next, to answer Richard S. Allen of a plea of debt on two protested notes; debt, four thousand and five dollars; interest on
7 $2,502.50, part thereof, from the 2d day of August, 1861, and on $1,502.50, the residue thereof, from the 23d day of August, 1861; damages, $500.00; and have then and there this writ.

Witness, Morton Marye, clerk of our said court, at the court-house of said city, the 26th day of July, 1871, and in the 96th year of the commonwealth.

MORTON MARYE.

Sergeant's return on above.

Not finding James H. McVeigh at his usual place of abode, the within summons was executed by leaving a copy of the within summon' with his sister-in-law, who resides at said dwelling-house, and explaining the same to her. Edgar McVeigh is not an inhabitant of my bailiwick.

J. T. WARD, *D. S.*,
For J. M. STEWART, *Sergeant.*

SEPT. 2D, 1871.

Summons.

The commonwealth of Virginia to the sergeant of the city of Richmond, greeting:

We command you to summon James H. McVeigh & Edgar McVeigh, late copartners, trading under the firm-name of J. H. McVeigh and Son, and William N. McVeigh, if they be found within your bailiwick, to appear at the clerk's office of our corporation court for our said city of Alexandria, at the rules to be holden for said court on the first Monday in September next, to answer Richard S. Allen of a plea of debt on two protested notes; debt, four thousand and five dollars; interest on $2,502.50, part thereof from the 2d day of August, 1861, and on $1,502.50, the residue thereof, from the 23d day of August, 1861; damage,
8 $500.00; and have there this writ.

Witness, Morton Marye, clerk of our said court, at the courthouse of said city, the 26th day of July, 1871, and in the 96th year of the commonwealth.

MORTON MARYE.

Sergeant's return on above.

Executed on William N. McVeigh, by delivering him a true copy of the within summons, August 3d, 1871.

THOMAS U. DUDLEY,
D. Sergeant.
For N. M. LEE,
Sgt. Richmond City.

And at another day, to wit, at rules held in the clerk's office of said corporation court, on the first Monday in September, 1871, came the plaintiff, by his attorney, and filed his declaration against the defendants, which declaration is in the words and figures following, to wit:

In the corporation court for the city of Alexandria, Sept. rules, 1871.

ALEXANDRIA CITY, *to wit*:

Richard S. Allen complains of James H. McVeigh, Edgar McVeigh, late copartners trading under the firm-name of J. H. McVeigh and Son, and William N. McVeigh, who have been duly summoned, &c., of a plea they render to the plaintiff $4,000.00 principal, and $5.00 charges of protest of the notes herein mentioned, with interest on $2,502.50, part thereof, from the 2d day of August, 1861, and on $1,502.50, the residue thereof, from the 23d day of August, 1861, the date of said protests respectively, which they owe to and
9 unjustly detain from the plaintiff.

And thereupon the plaintiff says that heretofore, to wit, on the 31st day of May, 1861, the said James H. McVeigh & Edgar McVeigh, by their firm-name of J. H. McVeigh & Son, made and signed a note bearing date the day last mentioned, by which they promised to pay, sixty days after the date thereof, to the order of the said William N. McVeigh, twenty-five hundred dollars, value received, at the branch office Exchange Bank of Virginia, at Alexandria, and after the said note was made, and before it became payable, the said William N. McVeigh endorsed the said note to the said Richard S. Allen. And the plaintiff avers that afterwards, when the said note became payable according to the tenor and effect thereof, to wit, on the 2d day of August, 1861, the

said note was duly presented at the branch of Exchange Bank of Virginia, at Alexandria, for payment thereof, and payment of the sum of money therein specified was then and there duly required, and the payment so required was not made, but was wholly refused, and thereupon the said note was duly protested for non payment, to wit, on the 2d day of August, 1861, the charges of which protest amount to $2.50, of all of which promises, and especially the said protest, the said William N. McVeigh had due notice.

And the plaintiff further says that heretofore, to wit, on the 21st day of June, 1861, the said James H. McVeigh & Edgar McVeigh, by their firm-name of J. H. McVeigh & Son, made and signed a certain
10 other note bearing date the day last mentioned, by which they promised to pay sixty days after the date thereof, to the order of the said William N. McVeigh, fifteen hundred dollars, value received, at the Branch Exchange Bank of Virginia, at Alexandria, and after the said note was made, and before it became payable, the said William N. McVeigh endorsed the said note to the said Richard S. Allen, and the plaintiff avers that afterwards when the said note became payable, according to the tenor and effect thereof, to wit, on the 23d day of August, 1861, the said note was duly presented at the Branch Exchange Bank of Virginia, at Alexandria, for payment thereof, and payment of the sum of money therein specified was then and there duly required, and the payment so required was not made but was wholly refused, and thereupon the said note was duly protested for non-payment, to wit, on the 23d day of August, 1861, the charges of which protest amount to $2.50, of all of which premises, and especially the said protest, the said William N. McVeigh had due notice; which two sums specified in said notes, together with the charges of protest of same, make up the sum of $4.005.00 above demanded.

By virtue whereof the said James H. McVeigh & & Edgar McVeigh and William N. McVeigh are liable to the plaintiff, and there is right of action for him against them for the principal, charges of protest, and interest above demanded, and the same and every part thereof remains unpaid, though the same has long since been due, and
11 the said J. H. McVeigh & Son and William N. McVeigh have been often requested to pay the same, but have refused so to do, and still do refuse, to the damage of the plaintiff $500.00, and therefore he sues.

CLAUGHTON, *P. Q.*

Whereupon the defendants, James H. McVeigh and William N. McVeigh, having been duly summoned, and not appearing, on the motion of the plaintiff, by his attorney, it was ordered that judgment be entered for the plaintiff against the said defendants, James H. McVeigh and William N. McVeigh, for the debt, interest, and charges of protest in the declaration mentioned, and also for the damages which the plaintiff had sustained by occasion of the detention of the said debt, unless the said defendants should appear and plead to issue at the then next rules; and this cause was continued for service as to defendant Edgar McVeigh to the then next rules.

At which day, to wit, at rules held in the clerk's office of the said corporation court on the first Monday in October, 1871, the said defendants, James H. McVeigh and William N. McVeigh, still failing to appear, on the motion of the plaintiff, by his counsel, it was ordered that the last order made against them in this cause be confirmed; and

this cause was continued for service as to defendant Edgar McVeigh to the then next rules.

And at another day, to wit, at a corporation court continued
12 and held for the city of Alexandria, at the court-house of said city, on Tuesday, the 10th day of October, 1871.

R. S. ALLEN
vs.
JAS. H. MCVEIGH & WM. N. MCVEIGH.

This day came the parties, by their attorneys, and the defendants say they owe nothing of the debt, as in the declaration supposed, in manner and form as the plaintiff against them hath complained, and of this they put themselves upon the country, and the plaintiff likewise, and the trial of this issue is continued to the next term of this court.

And at another day, to wit, at a corporation court of the city of Alexandria, continued and held at the court-house of said city, on July 12, 1878, to which day this cause, having been reinstated on the docket for a new trial in obedience to a mandate of the supreme court of appeals of Virginia, had been regularly continued.

This day came the parties, by their attorneys, and thereupon came a jury, to wit, George Dailey, Wm. Kitland, Benoni Wheat, J. E. Henderson, J. C. Taliaferro, E. Milburn, W. B. Waddy, G. L. Simpson, D. H. Appich, F. A. Coakley, J. D. Stanton, and J. C. Nevitt, who were sworn the truth to speak upon the issue joined, and having heard the evidence, were adjourned u'til to-morrow morning, 10 o'clock.

And now at this day, to wit, at a corporation court of the city of Alexandria, continued and held at the court-house of said city, on July 13, 1878.

This day came the parties, by their attorneys, and the jury
13 sworn in this cause on yesterday appeared in court pursuant to their adjournment, and upon their oath do say: "We, of the jury, find the issue joined for the defendant William N. McVeigh, and as to the defendant James H. McVeigh, we find the issue joined for the plaintiff, and we find for the plaintiff, as to said defendant James H. McVeigh, four thousand dollars ($4,000), the debt in the declaration mentioned, and allow interest thereon from the first day of April, 1865." Whereupon the plaintiff moved the court in arrest of judgment and for a new trial, which motions the court overruled, and it was considered by the court that, as to the defendant William N. McVeigh, the plaintiff take nothing by his bill, but that the said defendant go thereof without day, and that the plaintiff recover of the defendant James H. McVeigh four thousand dollars, with interest thereon from the 1st day of April, 1865, until paid, debt, and his costs by him about his suit in this behalf expressed.

MEMO.—Be it remembered that on the trial of this cause the plaintiff excepted to certain rulings of the court, and tendered his three bills of exceptions, which he prayed might be signed, sealed, and enrolled, and this is accordingly done.

The plaintiff's three bills of exceptions are in the words & figures following, to wit:

1st bill of exception.

R. S. ALLEN
vs.
JAS. H. MCVEIGH & SON & AL.

14 Be it remembered that when, on this second trial of the cause, the jury was called to be sworn, the plaintiff moved the court, upon the ground that the judgment of the supreme court of appeals embraced the defendant William N. McVeigh, endorser, and did not reverse the former judgment of this court as to the defendant James H. McVeigh, that the court should direct the jury to be sworn to try the issue between the plaintiff and the defendant William N. McVeigh, which was objected to by the cou'sel for the defendants, and thereupon the court sustained the objection, and directed the jury to be sworn to try the issues as to both of the defendants; to which said ruling of the court the plaintiff, by his counsel, excepted, and prayed that this his bill of exceptions be signed, sealed, and enrolled, which is accordingly done.

E. MAGRUDER LOWE, [SEAL.]
Judge of the Corporation Court of the City of Alexandria.

2d bill of exceptions.

R. S. ALLEN
vs.
J. H. MCVEIGH & SON ET AL.

Be it remembered that on the trial of this cause, after the jury had been sworn to try the issues joined between the plaintiff and the defendants, the plaintiff, to maintain the issue on his part, read to the jury the notes sued on, with the endorsements thereon.

$2,500.00.] ALEXANDRIA, 31 *May*, 1861.

Sixty days after date, we promise to pay to the order of W. N. McVeigh twenty-five hundred $\frac{00}{100}$ dollars, at Branch Exchange
15 Bank Va., at Alex'a. Value received.

J. H. MCVEIGH & SON.

Cr. drawer: W. N. McV.

(Endorsed:) W. N. MCVEIGH.

$1,500.00.] ALEXANDRIA, 21 *June*, 1861.

Sixty days after date, we promise to pay to the order of William N. McVeigh fifteen hundred $\frac{00}{100}$ dollars, at Branch Exchange Bank Va., Alex'a. Value received.

J. H. MCVEIGH & SON.

Cr. drawer: W. N. McV.

(Endorsed:) W. N. MCVEIGH.

And the certificates of protest and notice:

Protest.

$2,500.00.] ALEXANDRIA, 31 *May* 1861.

Sixty days after date, we promise to pay to the order of W. N. Mc-

Veigh twenty-five hundred $\frac{1}{100}$ dollars, at Branch Exchange Bank Va., at Alex'a. Value received.

J. H. McVEIGH & SON.

Cr. drawer: W. N. McV.

(Endorsed:) W. N. McVEIGH.

STATE OF VIRGINIA,
Alexandria County, to wit:

Be it known that on the second day of August, in the year of our Lord one thousand eight hundred and sixty-one, at the request of the cashier of the office of discount and deposite of the Exchange Bank of Virginia, at Alexandria, I, Robert J. Smith, notary public, by lawful authority duly commissioned and sworn, dwelling in Alexandria,
16 in the county and State aforesaid, presented at the Br'ch Exchange Bank Virg'a, at Alex'a, the original note, whereof the above is a true copy, and demanded of C. R. Hooff, cas., payment of the sum of money in the said note specified, whereunto he replied, "There are no funds."

Therefore I, the said notary have protested, and do by these presents solemnly protest against the drawers and endorser of the said note and all others whom it doth or may concern, for all cost, exchange, re-exchange, charges, damages, and interest suffered, and to be suffered for the want of payment thereof. And on the same day I delivered a notice of protest to W. N. McVeigh, by leaving it at his dwelling, in the hands of his white servant, informing him that he, the said endorser, was held liable for the payment of the said note.

In testimony whereof I have hereunto set my hand and affixed my seal notarial on the day and year first aforesaid.

[SEAL.] ROBT. I. SMITH,
Notary Public.

Tax on seal, $1.50; cert. of protest 1.00—2.50.
Protest book No. 5, page 63.

$1,500.] ALEXANDRIA, 21 *June*, 1861.

Sixty days after date we promise to pay to the order of Will-
17 iam N. McVeigh, fifteen hundred dollars at Branch Exchange Bank Va., Alex'a. Value received.

J. H. McVEIGH & SONS.

Cr. drawer: W. N. McV.
(Endorsed:) W. N. McVEIGH.

STATE OF VIRGINIA,
Alexandria County, to wit:

Be it known that on the twenty-third day of August, in the year of our Lord, one thousand eight hundred and sixty one, at the request of the cashier of the office of discount and deposits of the Exchange Bank of Virginia, at Alexandria, I, Robert I. Smith, notary public, by lawful authority duly commissioned and sworn, dwelling in Alexandria, in the county and State aforesaid, presented at the Br'ch Exchange Bank, Virgin'a, at Alexandria, the original note whereof the above is a true copy, and demanded of C. R. Hooff, cas., payment of the sum of money in the said note specified, whereunto he replied, "There are no funds." Therefore I, the said notary, have protested, and do by these presents solemnly protest, against the drawer and endorser of the said note and all others whom it doth or may concern for all

cost, exchange, re-exchange, charges, damages, and interest suffered and to be suffered for the want of payment thereof. And on the same day I delivered a notice of protest to Wm. N. McVeigh, by leaving it at his dwelling in the hands of his white servant, informing him that he, the said endorser, was held liable for the payment of said note.

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In testimony whereof I have hereunto set my hand and affixed my seal notarial on the day and year aforesaid.

[SEAL.] ROBT. I. SMITH,
Notary Public.

Tax on seal, $1.50; cert. of protest, $1.00—$2.50.
Protest book No. 5, page 158.

And the plaintiff there rested.

The defendants to sustain the issues on their part, introduced as a witness the defendant William N. McVeigh, who testified that some time previous to the 24th day of May, 1861, he sent his family to his farm in county of Culpeper; that he remained at his home in Alexandria, until after the Federal forces took possession of the city of Alexandria, on the 24th May aforesaid, and that on the 30th day of May, under a pass received from the United States authorities, he left his home in Alexandria, and went within the Confederate lines to join his family, with the intention of not returning to his residence in Alexandria, so long as the city was in the possession of the Federal authorities, which he supposed would be but a short time. That when he left his house in Alexandria, he left there an old white woman about seventy years of age, who had been for many years his servant, and three colored servants who were slaves; that he did not discharge the old woman, but advised her to go to the country. He also left at his house, his furniture and most of his wardrobe; that on leaving, he had great doubts, and expressed great doubts to his brother, whether he would ever see his property in Alexandria again. That himself and family remained in Culpeper, until the fall of 1861; that he then went with his family to Richmond, where he engaged in business, and remained there until after the close of the war, and *remained there until after the close of the war*, and until some time in 1874, when he returned with them to the city of Alexandria. That in the spring of the year 1862, he voted for a delegate to represent the county of Alexandria, in the house of delegates of the general assembly of Virginia, under an act of the Richmond legislature, authorizing refugees to vote. That the notes were endorsed by him in blank and delivered to his brother, James H. McVeigh; that the notes were filled up by Robert Crupper, who had a power of attorney from James H. McVeigh & Son, given some years before the war to authorize him to fill up the blanks. That at the sale of the assets of the Exchange Bank of Virginia, by the receiver when the notes sued on were offered for sale, he notified those present at such sale that he denied all liability as endorser on said notes, that after such notice, the said notes were purchased by Allen & Co., for about seventy-five dollars in legal currency. That while in Richmond during the war, he wrote one letter to Mr. Hoffman, the cashier of the Bank of the Old Dominion. That he was a member of the firm of C. A. Baldwin & Co., before and up to the war, who carried on the business of wholesale boot and shoe merchants in the city of Alexandria; that most of the stock of said firm had been sent South,

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before the occupation of Alexandria; that the remainder would have been sent South, but for the possession of the city of Alexandria, by the Federal forces. That he was acquainted with the officers of the Exchange Bank at Alexandria, and with its president & board of directors; that he was in almost daily intercourse with them whilst he was in Alexandria; that his own place of business as president of the Bank of the Old Dominion, was immediately across the street from said bank; that he was himself well known to them and in the community; that his absence was a circumstance which would be naturally known to them; that he had no knowledge & no notice of the existence of these notes until suit was brought upon them several years after the close of the war; that Robert Jamieson was president, and Chas. R.
21 Hoof was cashier of said Exchange Bank of Alexandria; that he did know whether the officers of the Exchange Bank knew of his absence, but Mr. Hooff could be sent for and examined if necessary.

The plaintiff then introduced James H. McVeigh, who testified that he had no personal knowledge on the subject, but he believed the notes sued on were either discounted on the dates thereof by the Exchange Bank of Virginia at Alexandria, and the proceeds placed to the credit of the makers, or that these notes were renewals of notes which had been theretofore discounted by said banks, and the money placed to the credit of the makers; he had no positive knowledge whether these notes had been discounted or were renewals of notes that had been so discounted, but he had no doubt that the fact was that the notes sued on were renewals of notes before discounted, and the proceeds placed to the credit of the maker. And this was all the evidence given in the case.

And thereupon the plaintiff moved the court to give the jury five instructions, as follows:

Plaintiff's instructions.

1ST INSTRUCTION.—If the jury believe from the evidence that the Exchange Bank of Virginia, at Alexandria, discounted the notes sued on before their maturity, or that they were renewals of notes theretofore discounted, and that the makers, endorsers, and endorsees were, at the time the notes were made, endorsed, and discounted, residents of Alexandria; that before the maturity of the notes, the President
22 issued the proclamations of date the 15th and 19th of April, 1861, and the Federal forces had taken permanent possession of said city, and the endorser, William N. McVeigh, after such possession, left his residence in said city with the intention of returning thereto to join his family, then visiting in the county of Culpeper, the court instructs the jury that the said proclamations did not prohibit intercourse by land between the hostile sections, nor relieve the holder of said notes from giving notice of the dishonor and protest thereof at their maturity; and if the jury further believe from the evidence that at the time the note matured, which fell due on the 2nd day of August, 1861, the said endorser had not changed his mind as to his return to his residence in the city of Alexandria, and that he had a residence in Alexandria, and that on the day the said note matured it was duly dishonored and protested, and that notice of said dishonor and protest was on that day left at the endorser's residence in said city with his white servant in charge of said residence, such notice is sufficient to bind the endorser, and the jury must find for the plaintiff as to

that note, if they further believe from the evidence that he is the bona fide holder of the note.

2ND INSTRUCTION.—If the jury believe from the evidence that the Exchange Bank of Virginia, at Alexandria, discounted the notes sued on before their maturity, or that they were renewals of notes theretofore discounted, the makers, endorser, and endorsee, were residents of the city of Alexandria; that before the maturity of said notes, and
23 after the Federal forces had taken permanent possession of said city, the endorser, Wm. N. McVeigh, left his residence, with the intention of returning thereto, and went within the Confederate lines to join his family, then on a visit to the county of Culpeper, and if the jury shall further believe that, at the time of the maturity of the note sued on, which fell due on the 23d day of August, 1861, the said endorser, William N. McVeigh, had not changed his mind as to his return to Alexandria, nor acquired a domicile elsewhere, and at that time had a residence in the said city, the court instructs the jury that neither the proclamations of the President, issued April 15th and 19th, 1861, nor the passage of the ordinance of secession by the State of Virginia, nor the fact that war was flagrant between the hostile sections relieves the holder of the note from giving the endorser notice of the dishonor and protest thereof. And if the jury further believe from the evidence that on the day the said note matured it was dishonored and protested, and that on that day notice of such dishonor and protest was left at the residence of the endorser in said city with his white servant in charge of the same, the court instructs the jury that such notice was sufficient to bind the endorser, and they must find for the plaintiff if they further believe from the evidence that he is the bona fide holder of said note.

3D INSTRUCTION.—If the jury believe from the evidence that the notes sued on were discounted by the Exchange Bank of Virginia, at Alexandria before their maturity, or that they were renewals
24 of notes theretofore discounted; that at the time they were discounted, the makers, endorser, and endorsee were residents of the said city; that before the maturity of the said notes, and after the permanent possession of the said city by the Federal forces, the endorser, William N. McVeigh, left his residence in the said city with the intention to return thereto, and went within the Confederate lines to join his family then visiting in the county of Culpeper, and that the said visit did not terminate until after the said notes matured, the court instructs the jury that it was the duty of the holder of said notes, at the maturity thereof, to have the same dishonored and protested for non-payment, and to give the endorser notice of such dishonor and protest. And if the jury further believe from the evidence that the said notes were, on the day of their maturity, respectively dishonored and protested, and on that day notice of the same was left at the residence of the endorser in the city of Alexandria, with his white servant in charge thereof, such notice was sufficient to bind the endorser, and the jury must find for the plaintiff if they further believe from the evidence that he is the bona fide holder of said notes.

4TH INSTRUCTION. If the jury believe from the evidence that the notes sued on were discounted by the Exchange Bank of Virginia at Alexandria before their maturity, or that they were renewals of notes theretofore discounted; that at the time of discount the makers, endorser, and endorsee were resident of said city; that before the
25 maturity of the said notes the Federal forces had taken permanent possession of said city; that after such possession the endorsee,

William N. McVeigh, left his residence in said city with the intention of returning thereto and went within the Confederate lines to join his family at the time visiting in the county of Culpeper; that the said endorser, at the time the said notes respectively became due, was within the Confederate lines in adherence of the Southern Confederacy in obedience to the Virginia ordinance of secession, the court instructs the jury that the said ordinance of secession was of no binding force or obligation; that neither the proclamations of the President of the United States issued in April, 1861, and August 16th, 1861, nor the existence of the war, nor the ordinance of secession of the State of Virginia obliged the said endorser to be absent from his residence in Alexandria, nor relieved the holder of said notes from giving him notice of the dishonor and protest thereof; that such absence was voluntary, and did not affect the rights and duties of the parties to said notes. And if the jury further believe from the evidence that at the time the said notes respectively fell due, that the said endorser had not abandoned his intention to return to Alexandria, and had not acquired a domicile elsewhere, and that the notes sued on were duly dishonored and protested, and on the day thereof notice of such dishonor and protest was left at the residence of the endorsee in Alexandria with
26 his white servant in charge of the same, such notice was sufficient to bind the endorser, and the jury must find for the plaintiff, if they further believe from the evidence that he is the bona fide holder of said notes.

5TH INSTRUCTION. The court instructs the jury that a domicile once acquired is presumed to continue until it is shown to have been changed. To constitute a new domicile, two things are indispensable: First, residence in a new locality; and second, the intention to remain there. The change cannot be made except facto et animo. Both are alike necessary. Either without the other is insufficient. Mere absence from a fixed home, however long continued, cannot work change. There must be the animus to change the prior domicile for another. Until the new one is acquired the old one remains.

The court further instructs the jury that these principles are applicable to this case; and if the jury believe from the evidence that at the time the notes sued on respectively matured, William N. McVeigh, the endorser, had not acquired a new domicile elsewhere, then his domicile was in Alexandria, and if his domicile was in Alexandria, it was the duty of the holder of the notes sued on to leave notice of the dishonor and protest of said notes at his dwelling in said city, and his absence from said dwelling at the time did not impose upon the holder the duty of giving any further notice. And if the jury believe from the evidence that the notes sued on were discounted; before their
27 maturity, or were renewals of notes theretofore discounted; that the plaintiff is the bona fide holder of them; that they were duly dishonored and protested, and notices of the same were on the day of protest left at the endorser's residence in Alexandria, with his white servant in charge of the same, such notice was sufficient to bind the endorser, and the jury must find for the plaintiff.

And the defendants prayed the court for one instruction as follows:

Instruction asked by defendant Wm. N. McVeigh.

If on or about the 30th day of May, 1861, and prior to the maturity of the notes sued on, Wm. N. McVeigh, having previously sent his fam-

ily, went himself within the Confederate military lines with the intention of not returning to Alexandria during its occupation by the United States forces, and accordingly remained with his family continuously within the Confederate military lines throughout the whole period of the war, and did not return to Alexandria with his family until the year 1874; that such absence, at the maturity of said notes, respectively, was known, or by the exercise of reasonable diligence must have been known to the Exchange Bank of Virginia, at Alexandria; that at the time of said maturity the armed forces of the United States and of the Confederate States confronted each other on lines immediately intervening between the city of Alexandria and the said
28 William N. McVeigh so as to cut off and prevent actual intercourse between the two, and such intervention continued down to the end of the war, the notice of dishonor shown by the notarial certificates of protest is not sufficient to fix the liability of Wm. N. McV., as endorser, and the jury must find for him.

The court refused to give either of the instructions prayed by the plaintiff, and gave that prayed by the defendant, to which ruling of the court, as well in refusing the instructions moved by the plaintiff as for giving that moved by the defendants, the plaintiff, by his counsel, excepted, and prayed that this, his bill of exceptions, be signed, sealed, and enrolled, which is accordingly done.

E. MAGRUDER LOWE, [SEAL.]
Judge of the Corporation Court of the City of Alexandria.

3d bill of exceptions.

R. S. ALLEN
vs.
JAMES H. MCVEIGH & SON & ANOTHER.

Be it remembered that on the trial of this cause the evidence before the jury being the same contained in the plaintiff's second bill of exceptions and none other, the jury rendered the following verdict:

"We, the jury, find the issue joined for the defendant William
29 N. McVeigh, and as to the defendant James H. McVeigh we find the issue joined for the plaintiff, and we find for the plaintiff as to said defendant James H. McVeigh four thousand dollars ($4,000), the debt in the declaration mentioned, and allow interest thereon from the 1st day of April, 1865."

Whereupon the plaintiff, by his counsel, moved the court to set aside the verdict upon the ground that the court erred in refusing to grant the instructions prayed by the plaintiff, and giving that prayed by the defendant William N. McVeigh, and also upon the further ground that the verdict was contrary to the evidence, which motion the court denied, to which said ruling the plaintiff, by counsel, excepted and prayed that this bill exceptions be signed, sealed, and enrolled, which is accordingly done.

E. MAGRUDER LOWE, [SEAL.]
Judge of the Corporation Court of the City of Alexandria.

A true copy from the records.
Teste:

MORTON MARYE, *Clerk.*

A true transcript of the record.
Teste:

GEO. K. TAYLOR,
Clerk Supreme Court of Appeals of Virginia, at Richmond.

Fee for transcript, $8.70.

30 To the Supreme Court of the United States:

The petitioner, Richard S. Allen, respectfully represents unto your honors that he is aggrieved by a final judgment of the supreme court of appeals of Virginia, the highest court of that State in which a decision could be had, in a suit in which the petitioner was plaintiff and James H. McVeigh, maker, and William N. McVeigh, endorser, were defendants.

A transcript of the record, which accompanies this petition, shows that this was an action of debt on two protested notes brought by the holder against the maker and endorser.

The defence relied on by the endorser was want of notice of protest.

One of the notes for $1,500.00 was protested on the 2d day of August, and the other for $2,500.00 on the 23d day of August, 1861.

At the time the notes were made, endorsed, and discounted, all the parties were residents of and actually dwelling in the city of Alexandria.

Just before the Federal authorities took possession of the city in May, 1861, the endorser, William N. McVeigh, had sent his family to his farm in the county of Culpeper, where his widowed sister-in-law was residing.

31 A few days after the possession of Alexandria the endorser, under the protection of a pass from the Federal authorities, went through the lines to join his family and remained with them until the fall of 1861, when they all went to Richmond, where they remained during the war, the said endorser claiming Alexandria as his domicile and residence, and voting while in Richmond for a delegate to represent Alexandria in the Virginia legislature.

When he left Alexandria he left his residence, all of his furniture, and most of the wardrobe of himself and family in the possession and care of one white and several colored servants.

When the notes sued on were protested, to wit, on the 2d and 23d of August, 1861, notices of protest were left at the residence of the endorser, with his white servant in charge thereof.

At the trial of the case the plaintiff prayed the court to give the jury several instructions (set out on pages 21, et seq., of the record), which the court refused, and to which refusal the plaintiff excepted.

The court gave an instruction, prayed by the defendants, and the plaintiff excepted to that ruling.

The jury found a verdict for the defendants.

The plaintiff moved for a new trial, which was refused, and the plaintiff excepted to the said refusal, and judgment was entered up upon the verdict.

32 The plaintiff then applied to the supreme court of appeals of Virginia for a writ of error to the said judgment of the corporation court for the city of Alexandria, which was refused upon the ground

that the said supreme court of appeals was of the opinion that the judgment of the corporation court was plainly right.

The petitioner now prays for a writ of error to the supreme court of appeals of Virginia to review and reverse the judgment of said court, which is in effect an affirmance of the judgment of the corporation court.

The instructions prayed by the plaintiff raised, directly and distinctly, several Federal questions as to which the refusal to give the instructions was a decision adverse to the rights which the plaintiff claimed under the proclamations and ordinance named in the instructions.

These instructions were substantially as follows:

1. The plaintiff prayed the court to instruct the jury that if the defendant endorser had a residence in the city of Alexandria on the 2d day of August, 1861, when the note for $1,500.00 was protested, that the proclamations of the President, of date the 15th & 19th of April, 1861, did not make intercourse between the hostile sections, by land, unlawful, nor relieve the holder of the note from giving the endorser notice of dishonor and protest thereof, by leaving notice of the same at his residence in Alexandria.

2. That neither the said proclamations nor the ordinance of
33 secession of the State of Virginia made it unlawful for the endorser to be at his residence in Alexandria on the 2d & 23d days of August, 1861, when the notes sued on were respectively protested; that his absence therefrom not being required by the said proclamations and ordinance, it was voluntary, and that neither the said proclamations, nor ordinance relieve the holder of the said notes from the duty of giving notice of the protest thereof, by leaving notice of the same at the endorser's residence during such voluntary absence.

These are substantially the Federal questions raised.

This court has repeatedly decided that these are Federal questions, and have also decided that the law of these questions is on the side of the plaintiff.

Matthews v. McSted, 91 U. S., 7.
Ludlow v. Ramsay, 11 Wall., 581.
Mitchell v. U. S., 21 Wall., 350.
Bond v. Moore, 93 U. S., 593.
Williams v. Bruffy, 96 U. S., 176.

The petitioner prays your honors to award the writ of error, as herein before prayed.

RICHARD S. ALLEN,
By his attorney, H. O. CLAUGHTON.

APRIL the , 1880.

34 UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States to the honorable the judges of the supreme court of appeals of the State of Virginia, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of appeals of Virginia before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Richard S. Allen, plaintiff in error, and William N. McVeigh, defendant in error, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of or an authority exercised under said

State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in
35 favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error, hath happened, to the great damage of the said Richard S. Allen, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the nineteenth day of April, in the year of our Lord one thousand eight hundred and eighty.

D. W. MIDDLETON,
Clerk of the Supreme Court of the United States.

Allowed by—

M. R. WAITE,
Chief Justice, Sup. C't U. S.

I, George K. Taylor, clerk supreme court of appeals of Virginia, at Richmond, do hereby certify that a copy of the within writ of error is filed with the original papers of said cause in my office.

Given under my hand this 28' April, 1880.

GEO. K. TAYLOR, *C. C.*

36 The United States of America to William N. McVeigh, greeting

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a writ of error, filed in the clerk's office of the supreme court of appeals of the State of Virginia, wherein Richard S. Allen is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this nineteenth day of April, in the year of our Lord one thousand eight hundred and eighty.

(Signed) M. R. WAITE,
Chief Justice, Sup. C't, U. S.

37 On this 22nd day of April, in the year of our Lord one thousand eight hundred and eighty, personally appeared R. T. Lucas before me, the subscriber, K. Kemper, a notary public in and for the

city of Alexandria, in the State of Virginia, and makes oath that he delivered a true copy of the within citation to William N. McVeigh this 22nd day of April, 1880, in the said city of Alexandria.

R. T. LUCAS.

Sworn to and subscribed the twenty-second day of April, A. D. 1880.
[SEAL.] K. KEMPER, *N. P.*

I, George K. Taylor, clerk supreme court of appeals of Virginia, at Richmond, do hereby certify that a copy of the within citation is filed with the original papers of said cause in my office.

Given under my hand this 28' Ap'l, 1880.

GEO. K. TAYLOR, *C. C.*

38 Know all men by these presents, that we, Rodolphe Claughton and Hierome A. Claughton, are held and firmly bound unto William N. McVeigh, in the full and just sum of two hundred and fifty dollars, to be paid to the said William N. McVeigh, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this day of April in the year of our Lord one thousand eight hundred and eighty.

Whereas lately, at a supreme court of appeals of the State of Virginia in a suit depending in said court between Richard S. Allen and William N. McVeigh, a judgment was rendered against the said Richard S. Allen, and the said Richard S. Allen having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said William N. McVeigh, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that, if the said Richard S. Allen shall prosecute said writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of—

RODOLPHE CLAUGHTON. [L. S.]
H. O. CLAUGHTON. [L. S.]

Approved by—

M. R. WAITE,
Chief Justice Sup. C't U. S.

39 I, George K. Tayler, clerk supreme court of appeals of Virginia at Richmond, do hereby certify that a copy of the within bond is filed with the original papers of said cause in my office.

Teste:

GEO. K. TAYLER, *C. C.*

40 STATE OF VIRGINIA,
City of Richmond, to wit:

I, George K. Tayler, clerk of the supreme court of appeals of Virginia, at Richmond, do hereby certify that the foregoing is a true transcript of the record.

In testimony whereof I have hereto set my hand and annexed the seal of the said court this 28th day of April, 1880.

[SEAL.] GEO. K. TAYLER,

Clerk Supreme Court of Appeals of Virginia, at Richmond.

(Indorsement on cover:) No. 510. Richard S. Allen, plaintiff in error, vs. William N. McVeigh. Virginia sup. c't of appeals. Filed 11th May, 1880.

17-433

OFFICE SUPREME COURT U.S.
FILED
MAR 19 1883
JAMES H. McKENNEY, Clerk.

IN THE

Supreme Court of the U. S.

RICHARD S. ALLEN,
vs. } No.
WILLIAM N. McVEIGH.

Brief of Counsel for Plaintiff in Error.

This record raises two questions.

1. Has this court jurisdiction of this case?

2. Was the judgment of the State court upon the merits erroneous?

The Facts of the Case:

The facts are as follows:

In the spring of 1861, James H. McVeigh made the notes sued on payable to the order of the defendant William N. McVeigh, who indorsed them for the accommodation of the maker, and the notes so made and indorsed were discounted by the Exchange Bank of Virginia, at Alexandria.—At the time of the making and negotiating of the notes all of the parties resided in the City of Alexandria.

A short time previous to the occupation of the City of Alexandria by the Federal authorities, the defendant's family went to his farm in the County of Culpeper to spend the Summer and a few days after said occupation the defendant joined his family at their summer retreat.

The residence in Alexandria, with all of the furniture and most of the family's wardrobe was left in charge of an old family servant, a white woman and the defendant's colored servants.

The defendant did not change his residence, but did not intend to return while the Federal authorities were in Alexandria, which he expected would be only a short time.

He considered Alexandria his residence as late as the spring of 1662, and voted at that time for a member to represent Alexandria in the Virginia House of Delegates.

He and his family remained at his farm in Culpeper until the fall of 1861, when they went to the City of Richmond, where they remained during the war and for some years after its close. At the maturity of the notes sued on, they were duly dishonored, and notice of dishonor was on the day thereof left at the defendant's residence in Alexandria with his white servant in charge thereof.

The Defence.

The defence is that this notice was insufficient to bind the indorser, and the court below upon this defence gave judgment in favor of the defendant.

The first point to which I invite the attention of the court is the sufficiency of the notice of dishonor of the notes sued on, and in order that the question of jurisdiction may not be involved in the consideration of the merits of the case I will consider the sufficiency of the

notice without regard to the political facts existing at the time the notice was given.

Suppose the temporary absence of the defendant from his residence in Alexandria had been because of his intention not to return to the city until the occurrence of any other event, and for any other reason satisfactory to himself, for example, the prevalence of some infectious disease, would not the notice have been sufficient? Ogden v. Cowley, 2 Johns, 275.

The sufficiency of notice is a question of diligence Some general rules have been settled by this court which have been universally accepted as the law. These may be briefly stated as follows, to wit:

1. That if the holder and indorser reside in the place where the note is dishonored, notice of dishonor left at the indorser's residence with some one in charge of the residence will be sufficient. If left with the indorser's servant, in charge of his residence, the indorser is responsible for the fidelity of his servant as to the delivery of the notice to the master.

Williams v. Bank, 2 Peters 96. Bank v. Hatch, 6 Peters 256.

2. If the residence is closed and the indorser and his family are absent, notice left at his residence, or with a neighbor next door will be sufficient.

Williams v. Bank, 2 Peters, 96. Stewart v. Eden, 2 Caines, 121. Runyon v. Mountford, Busbee, 371. Lewistown Falls Bank v. Leonard, 43 Main, 144.

3. If at the time the note is negotiated the indorser had a residence in the State, and before the maturity of the note he changes his residence and removes to another State; this fact relieves the holder from the necessity of giving notice.

Magruder v. The Bank 9 Wheaton, 598. Gist v. Lybrand, 3d Ohio, 317. Foster v. Julian, 24 N. Y. 28.

FIRST.

Had the defendant a residence in Alexandria when these notes were dishonored? If he had, then the notices left at that residence were sufficient. Had he? He admits that he had. The law adjudges that he had. The house at which the notices were left was his home —the place where he lived. It contained the comforts of his daily life, and was in the charge of his servants, who ministered to his daily wants. He admits that he left it temporarily, with the intention of soon returning to it. That when he left there he had not acquired any other residence, had no other home. When he left Alexandria he did not inform the holder that he would be at any other place at the maturity of the notes, and direct notices to be sent to him there. Under these circumstances it was the duty of the holder to leave notice at his residence in Alexandria, and if he had failed to do so, and the defendant had returned the next day, notice then given would have been insufficient. If it had been urged in excuse for not leaving the notice in due time, that the indorser was absent for an uncertain period, the obvious answer would have been: "I had a residence in Alexandria, and one there to receive notice for me."

This Court, in the case of Mitchell vs. the United States, decided that one who left his residence and went within the Confederate lines temporarily, did not abandon his old residence, nor acquire a new one.

21 Wall., 350.

In this case we find that the defendant had his residence, in the sense of a domicile, in the city of Alexandria, and that he had in that city also a residence in the sense of a dwelling-house. This was just the place

where the indorsee had contracted to give notice, and where the indorser had contracted to receive it.

Notice given under these circumstances must necessarily be sufficient.

SECOND.

But concede that the defendant had, at the time the notices were left at his home in Alexandria, ceased to be a resident of that City, and had acquired a residence in Culpeper County. The holder of the notes had no notice of that fact, nor any reason to suspect its existence, or to make inquiry respecting it. Will it be contended that an indorser can abandon his former residence and yet keep up the appearance that it is still his residence, and invite those who have business with him to treat it as his residence, and then, when they have acted upon these false appearances held out by the indorser, escape liability by pleading that he had deceived them?

If the defendant had sent away his furniture and servants and rented out his house, or offered it for rent, this would have put the holder of the notes upon inquiry as to where he had gone, and where a notice would reach him, but who would think of inquiring at the residence of a man whether or not he resided at some other place?

But suppose the notary had found the house closed up, and upon inquiry, had ascertained that the indorser had moved away, where and of whom in the city of Alexandria could he have learned where the indorser was, or to what place a notice could be sent to him?

Under such circumstances further inquiry would be unnecessary.

THIRD.

Further, suppose the notary had found the residence abandoned, and had, upon inquiry, ascertained that the indorser had removed to Baltimore, Maryland. This Court has decided that in such a case the holder is excused from giving notice.

Magruder vs. Bank, 9 Wheaton, 598.

If in time of peace an indorser, being in Virginia when the note was indorsed, removed to the adjoining State before its maturity, thereby relieved the holder from the necessity of giving him notice of dishonor.—what think you of a case where the indorser, who in time of war leaves his home, within the jurisdiction of his own sovereign, and goes within the jurisdiction of the enemy at war with his sovereign? Would not that relieve the holder from the duty of giving notice? It is true that if before the maturity of the note, when the holder and indorser are citizens of different Governments, war becomes flagrant between those Governments, both the right and the duty respecting the giving of notice are suspended; but was it ever held that a citizen, by leaving his own country and going into the country of the enemy, could impose upon the holder the duty of giving notice after the close of the war? It is quite evident from the authorities cited that these notices would have been sufficient to bind the indorser had it not been for the existence of hostilities, as they existed in the summer of 1861. Did the existence of hostilities make these notices—otherwise sufficient—insufficient? After the convention of Virginia had passed the ordinance of secession, the President extended the proclamations of blockade, issued respectively on the 15th and 19th of April, 1861, to the State of Virginia, and on the 24th

day of May, the Federal authorities occupied the city of Alexandria. The defendant, after the said occupation, left his home in Alexandria and went within the Confederate lines. Upon what principle of law, either commercial, international, or public, was the holder of the notes required to do more than leave notice of dishonor at the residence of the indorser in Alexandria! Concede that at the time of said occupation war had been declared, and all the people in Alexandria had thereby become enemies to all those within the Confederate lines, could the indorser by deserting from his lawful Government and joining the enemy, acquire any rights against the loyal citizens of the Government, or impose upon them any duties?

Suppose an indorser residing in the City of Boston had, after the Declaration of Independence, and the expulsion of the British from that city, left his home and gone across the lines into Canada, and remained there during the war, and the holder of a note on which he was indorser had left notice of dishonor at his residence in Boston, can it be supposed that upon his return to Boston after the close of the war, and being sued on that note, that the courts of Massachusetts would have held that the notice was insufficient, and that the holder was obliged to give him an additional notice after he returned home? Why, it is the law that if an indorser in time of peace, move from one of the United States in which he resided when the note was indorsed, into an adjoining state—that the holder is not bound to send notice out of the state. Can it be conceived that in a case when in time of war, the indorsee leaves his home to join the enemy—that he would be entitled to any more consideration?

Such an idea is too preposterous for consideration. In this case the indorser left the City of Alexandria, in the ocupation and under the jurisdiction of his soverign and went within the territory of the enemy—the Confederate States waging war against the United States.

Thorington vs. Smith, 8 Wall, 11;

It is the law that when war is flagrant between the governments of the holder and indorser at the maturity of the note, that notice cannot be given during the war, and therefore must be given after its close—because all intercourse is forbidden, and if the holder should violate that prohibition and give the indorser actual notice, it would be insufficient and void.

We may go one step further and concede that if during the late war and after the intercourse between the sections had been proclaimed unlawful, the Federal authorities had occupied the territory in which the holder resided—while the Confederates occupied that in which the indorser resided—that notice could not have been given until after intercourse had been re-established. But such is not this case—for in the first place—intercourse was not unlawful, and in the second place the hostile lines did not intervene between the holder and the indorser, but the indorser voluntarily went within Confederate lines when it was lawful for him to do so, and voluntarily remained there when it was unlawful for him to remain.

Ludlow vs. Ramsay, 11 Wall, 581;
Williams vs. Bruffy, 96 U. S. 176;

These authorities apply to both of the notes sued on. As to the note which matured prior to the 16th day of August, 1861, another principle applies.

At the maturity of that note, intercourse between the City of Alexandria and the territory of Virginia within the Confederate lines was not unlawful—there was not a state of war between them. At the maturity of that note it was the duty of the holder *then* to give the indorser notice of dishonor. Where was that notice to be given? Certainly at his residence in Alexandria if he had a residence there. Suppose he had had there no residence, what was the holder to do? For he must do whatever it was his duty to do that very day. Could any one have told the holder where a special messenger would have found the indorser? The indorser had in such a case made it impossible for the holder to do what it was his duty by the contract to do, and the law is clear that when the indorser by his own conduct puts it out of the power of the indorsee to perform his contract, the law excuses the performance of it.

In every case where there is no suspension of the right or duty to give the notice at the time of dishonor—the notice must be given *then*, upon the best information which the holder can obtain, and acting in good faith, though under a mistake the notice is sufficient and the holder upon the discovery of the mistake is not required to give other or further notice.

Lambert vs. Gheselin, 9 How, 552;
Merchant's Bank vs. Birch, 17 Johns, 26;

Jurisdiction.

This brings us to the consideration of the question of jurisdiction.

The ground upon which the Supreme Court of Appeals of Virginia decided all the cases of this kind, is clearly expressed in the opinion of Judge Anderson in the case of Bank of Old Dominion vs. McVeigh, 26 Gratt, 785.

The Court held that the proclamations of the President, issued in April, 1861, inaugurated a war and forbade intercourse between the sections. In this case, the question of the effect of the proclamations of the President and the war as inaugurated by them upon the contract of endorsement was distinctly raised, and this Court has repeatedly held that this is a Federal question.

The authorities upon this point are cited in the brief filed in opposition to the motion to dismiss for want of jurisdiction, to which I ask the attention of the Court, confining myself to a very summary review of them in this argument.

Matthews vs. M'Stea 91, U. S. 7.
Bond vs. Moore, 93 U. S. 593.

There is no analogy between this case and that of the Bank of the Old Dominion, so far as the question of jurisdiction is concerned. In that case the Federal question was not distinctly raised at the trial, and although it was fully discussed in the opinion of the Court, it was expressly stated in the opinion that the judgment of the Court would have been the same although the views held upon the Federal question had been the reverse of those expressed in the opinion. It was upon this ground that the case of the Bank of the Old Dominion was dismissed for want of jurisdiction.

98 U. S., 332.

But in this case the Federal question was raised at the trial.

The instructions granted for the defendants raised the Federal question, in that it held that the following facts determined the question as to the sufficiency of the notices to bind the endorser.

1st. The voluntary act of the endorser in leaving his home within the Federal lines and entering the Confederate lines with the intention of adhering to the Confederate government, and of not returning to his home until the Federal authorities had been expelled therefrom.

2. That at the maturity of the notes sued on there was existing a war, with intervening hostile lines, which cut off and prevented intercourse between the city of Alexandria and the defendant.

First. The Confederate military authorities were marshaled by the authority of a government assuming to be sovereign, and styled "Confederate States of America." Virginia, by its ordinance of secession, had transferred the allegiance of her citizens from the United States to the Confederate States.

If the endorser's act of leaving his residence in Alexandria and going within the Confederate lines affected the question of the sufficiency of the notice left at his residence, it must have so affected it by virtue of some law, which suspended the operations of the law merchant, (for the instruction by implication, at least,) concedes that Alexandria was the endorsee's residence. What law? It must have been the law either of the United States or the Confederate States, for this Court has repeatedly held that the general public law is not applicable to the late civil strife, unless made so by the action of the Government. x

Williams vs. Bruffy 96, U. S., 176.

Was there any law of the Confederate States that suspended the operation of the law merchant? Of these laws the Court was bound to take notice, if they were public laws.

x The Lattawana 21 Wall 558
The Scotland 105 U. S. 29.

Did the Ordinance of secession of the State of Virginia, commanding the allegiance of the endorser and his voluntary act of going within the Confederate lines, in obedience to that ordinance, suspend the operation of the law merchant? If this be so, it must be simply because of the validity of that ordinance to withdraw the State of Virginia from the Federal Union. Had this ordinance that validity?

Surely this is a Federal qnestion.

Second. Was there, at the maturity of the notes sued on, any law of the United States which suspended the operation of the law merchant upon the contract of endorsement of these notes? If so, it must have been a public law of which this Court was bound to take notice.

The laws under which the armed forces of the United States, referred to in the instruction, confronted the Confederate forces, were the Act of Congress authorizing the enrollment of troops for the suppression of the rebellion, and the proclamations of the President of the United States, issued respectively on the 15th, 19th, and 27th of April, 1861.

Did these laws affect the contract of endorsement, or suspend the operation of the law merchant in respect thereto?

Surely this is a Federal question.

The Court instructs the jury that the fact that the armed forces of the United States were at a certain locality, at a certain time, under certain laws of the United States, affected the sufficiency of these notices.

Does not this involve the construction of those laws? I not the construction which the Court gave them adverse to the plaintiff in error?

But this is not all. Federal questions were distinctly raised in the instructions which the Court refused to give for the plaintiff. They may be stated as follows:

1st. That the hostilities and armed forces as these existed at the maturity of the notes sued on, so existed by virtue of the proclamations of the President, issued in April, 1861, did not constitute a war "*inter gentes*," and that the said proclamations did not declare war, nor prohibit intercourse by land, between the sections, and that therefore it was both the duty and the right of the holder to give the endorser notice of dishonor at the maturity of the notes.

2d. That neither the said proclamations nor the existence of the war, by virtue thereof, required the defendant to be absent from his home in Alexandria when the notice was left there. That such absence was voluntary, and neither deprived the holder of his right to leave notice at his residence, nor imposed upon the holder the duty of giving any further notice after the close of the war.

These Federal questions were distinctly raised and relied on at the trial, and were decided adversely to the plaintiff in error.

The instructions refused the plaintiff expressed correctly the law, as follows:

If the endorser had a residence in Alexandria, and notices were left there on the day of dishonor, such notices were sufficient to bind the endorser, because the proclamations of the President did not forbid intercourse between the sections, and the existing military lines were no obstacle to the endorsers being at or returning to his home in Alexandria.

The refusal to give these instructions was error.

They involved Federal questions, without the consideration of which it was impossible to hold the notices insufficient, and the ruling upon these Federal questions was adverse to the plaintiff in error. Therefore this Court has jurisdiction, and the judgment of the Court below should be reversed.

It is respectfully submitted that there is no escape from these conclusions.

H. O. CLAUGHTON,
Counsel for Plaintiff in Error.

OFFICE SUPREME COURT U.S.
FILED
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IN THE

SUPREME COURT OF THE UNITED STATES.

RICHARD S. ALLEN
vs.
WILLIAM N. McVEIGH.
No. 223.

Brief of P. Phillips, W. A. Maury and W. Hallett Phillips, for Defendant in Error.

P. PHILLIPS,
W. A. MAURY,
W. HALLETT PHILLIPS.

B. O. POLKINHORN, PRINTER.

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Wm. N. McVeigh, at Alexandria, indorsed two notes of McVeigh and son, one for $2,500, and one for $1,500, each payable at the Branch Exchange Bank of Va., and each payable 60 days after date. The notes are dated 31 May and 21 June, 1861.

At the maturity of the notes the bank, the owner thereof, caused the same to be protested for non-payment. The notice given to the indorser is as follows:

> "In the same day I delivered notice of protest to Wm. N. McVeigh, by leaving it at his dwelling, in the hands of his white servant, informing him that the indorser was held liable for the payment of said note."

Subsequently the assets of the bank passed into the hands of a receiver, and were advertised for sale at public auction.

McVeigh, the indorser, was present at the sale, and when these notes were offered, gave public notice that he denied all responsibility thereon as indorser.

Notwithstanding this, R. S. Allen, then present, purchased these notes with the accumulated interest for the sum of *seventy-five dollars.*

In 1871 Allen brought his action in the Corporation Court, in Alexandria, against the maker and indorser, and on the trial offered in evidence the notes and the notices on which to charge the indorser. No other evidence was offered by him.

The defendant, Wm. N. McVeigh, then testified "that some time previous to 24 May, 1861, he sent his family to his farm, in the county of Culpepper; that the Federal forces took possession of the city on 24 May, and that on the 30 May, under a pass received from the United States authorities, he left his home in Alexandria and went into the Confederate lines to join his family, with the intention of not returning to his residence in Alexandria so long as the city was in possession of the Federal authorities."

He further testified to the purchase of these notes by Allen after he had given notice that he denied all responsibility thereon as indorser.

Further, that he was intimately acquainted with the officers of the bank, and was in daily intercourse with them while in Alexandria his place of business, as president of the Bank of Old Dominion, being across the street from their bank; and that his absence from Alexandria was a circumstance which would be naturally known to its officers; and that he had no knowledge and no notice of the existence of these notes until suit was brought after the close of the war. * * * (p. 9.)

In this state of the case, the court charged the jury as follows:

"If, on or about 30 May, 1861, and prior to the maturity of the notes, Wm. N. McVeigh, having previously sent his family, went himself within the Confederate military lines with the intention of not returning to Alexandria during its occupation by the United States forces, and accordingly remained with his family continuously within the Confederate military lines throughout the whole period of the war, and did not return to Alexandria until the year 1874—that such absence at the maturity of the notes, respectively, was known, or, by the exercise of reasonable diligence, must have been known to the Exchange Bank, of Virginia, at Alexandria; that at the time of said maturity the armed forces of the United States and of the Confederate States confronted each other on lines immediately intervening between the city of Alexandria and the said William N. McVeigh so as to cut off and prevent actual intercourse between the two, and such intervention continued down to the end of the war; the notice of dishonor shown by the protest is not sufficient to fix the liability of the indorser, and the jury must find for him."

This instruction was given as the legal result of the evidence—that McVeigh had left Alexandria without any intention to return, as long as the Federal forces occupied it; and that this was known to the officers of the bank when the notices were given.

Verdict and judgment having been rendered for McVeigh, application was made to the Supreme Court of Appeals for a writ of error, which was denied; and the case is now here on the writ of error of this court.

The validity of this notice, under the circumstances of this case, has been, substantially, several times before this court and the Supreme Court of Virginia.

Earle vs. *J. H. McVeigh*, decided at the October Term, 1875, on appeal from the Circuit Court for Eastern

District of Virginia, involved the legality of certain judgments rendered on a summons for McVeigh, executed 24th February, 1862, by leaving a copy posted on the 'front door of his usual place of abode; neither he nor his wife, nor any white person who is a member of his family and above the age of sixteen years, being found at his said usual place of abode."

In holding the judgments to be void, this court say:

> "Neither McVeigh nor his family resided there; on the contrary, the case shows that his family left that city six weeks before the same was occupied by the Federal forces, and that they departed, leaving no white person in the house from which they departed; and that these facts were well known to the attorney of the respondents and to the officer who made the return in question, which was seven months after the complainants had left the county, and was residing within the Confederate lines. Tested by these considerations, it is clear that the house where the notice was posted was not the usual place of abode of the defendant to those suits." 91 US 503

As this case was an appeal from the Circuit Court, no jurisdictional question was involved. It is cited to show that the service of the summons, though literally following the requirements of the statute, was not effective when applied to the facts of the case—in other words, that could not be considered as "the usual place of abode" of one who had "left it six days after the Federal forces had entered the city, and ever after remained with his family within the Confederate lines."

In the *Bank of the Old Dominion* vs. *William N. McVeigh*, decided at the October term, 1878, McVeigh was sought to be charged as indorser on a note executed in 1861.

The notice relied on is precisely the one given in the case before us.

The facts relative to the question of its sufficiency are the same.

The charge of the court is word for word the charge now under consideration, except with this addition—

> "That, at the time of the maturity, the armed forces of the United States and of the Confederate States confronted each other on lines immediately intervening between the city of Alexandria and the said Wm. N. McVeigh so as to cut off and prevent actual intercourse between the two, and such intervention continued down to the end of the war."

Judgment having been rendered for defendant, the Bank of the Old Dominion sued out the writ of error to the State court, which affirmed the judgment of the Corporation Court of Alexandria in favor of McVeigh, and this judgment was brought here for revision.

A motion to dismiss for want of jurisdiction was granted. The Chief Justice, speaking for the court, said:

> "All the court below decided was, that by the general principles of commercial law, if, during the late civil war, an indorser of a promissory note abandoned his residence in loyal territory, and went to reside permanently within the Confederate lines before the note matured, a notice of protest left at his former residence was not sufficient to charge him if his change of residence was known, or, by the exercise of reasonable diligence, might have been known to the holder of the note when it matured."
>
> 98 U. S., 332.

Before it was brought here the case had been twice considered by the Supreme Court of the State.

On its second presentation the Court say:

> "Nothing can be clearer than that it was decided by the court, when it was here before, (26 Grat., 852,)

> that the notice was insufficient in law to fix the liability upon the indorser, Wm. N. McVeigh; and that it was incumbent on the holder, within a reasonable time after the communication had been restored between the parties by the termination of the war, to give the indorser notice of the non-payment of the notes."

This principle of law, as settled by the adjudication of the highest court of the State, is one which this court declare it has no jurisdiction to review.

In dismissing the writ of error, reference is made to the case of *Insurance Co.* vs. *Hendren*, 92 U. S., 286, in which it is held that this court had no jurisdiction to re-examine the judgment of a State court when the question presented was as to the effect, under the general public law, of a sectional, civil war upon the contract—the subject of the suit.

We insist, there is nothing in the additional terms used in the instruction which legally varies it from the one passed upon in the case of the Bank of the Old Dominion.

The doctrine twice announced by the supreme court of the State, that "it was incumbent on the holder, within a reasonable time after communication had been restored between the parties by the termination of the war, to give the endorser notice," is not only law in the State of Virginia, but is of general application.

The principle is thus stated by MARSHALL, C. J.:

> "Where, on account of hostilities, notice cannot be given, in order to charge the indorser, notice must be given within a reasonable time after the removal of the impediment."
>
> *Hopkins* vs. *Page*, 2 Brock, 34;
>
> *Patience* vs. *Townsley*, 2Smith's Rep., 223;
>
> Story Prom. Notes, § 262.

Ray v. Smith 17 Wall 411

In *Bond* vs. *Moore*, the holder of a bill drawn in Tennessee on parties in New Orleans, payable 13th June, 1862, presented the same 20th June, 1865.

The defendant insisted that this presentation was not within a reasonable time after the removal of the obstructions occasioned by the war.

There was judgment for defendant, and this was here affirmed, the court holding that while the war existed as a political fact, until the Proclamation of 13 June, 1865, (relied on by the plaintiff) business intercourse was allowed after 29 April, 1865. Bond, therefore, might have *properly demanded payment at any time after that date.*

93 U. S., 593.

This being the state of the law regulating the rights and duties of the holder of commercial paper, the bank has chosen to rest the liability of the indorser on a notice left at his former residence in Alexandria, with the knowledge that he had left the city with the intention of not returning during its occupation by the United States forces.

That this was insufficient notice, as we have said, is the established law of the State. The decision of this question is not subject to be reviewed here.

On these considerations we maintain that if the record presented no other question than such as arises on the instruction given for defendant, the writ must be dismissed for want of jurisdiction.

It is insisted that the writ may be maintained on the refusal of the court to give the series of instructions prayed for by the plaintiff.

The *first* of the five instructions is in substance this—that if before the maturity of the notes McVeigh, after the Fed-

eral forces had taken possession of Alexandria, left said city with *intention of returning thereto*, then the proclamations of 15 and 19 April, 1861, did not prohibit intercourse by land, nor *relieve* the holder from giving notice at their maturity.

The *second* instruction refers to the note due 23 August, 1861, and the court is asked to charge, that if at the maturity thereof, McVeigh "*had not changed his mind as to his return to Alexandria*," nor acquired a domicile elsewhere, neither the proclamations, the ordinance of secession nor that the war was flagrant, relieve the holder from giving notice.

The *fourth* instruction is to the effect that if, at the maturity of the notes, McVeigh was within the Confederate lines, in obedience to the ordinance of secession, that neither that ordinance, the proclamations of April, 1861, nor the existence of the war, oblige the indorser to be absent, nor relieve the holder from giving notice at maturity.

These are the only instructions which contain the slightest semblance of a Federal question.

These instructions were properly rejected, for many reasons.

FIRST. The proclamations of 15th and 19th April, 1861 (12 U. S. Stats., 1,258) have no relevancy to the case.

As stated in the brief filed on motion to dismiss, the first calls forth the militia to suppress a combination in certain enumerated States. Virginia is not included in the enumeration.

The second merely establishes a blockade in the ports of the States enumerated in the first.

In the reply brief of plaintiff in error, it is said that the

proclamation of *27th April, 1861*, extends that of the 19th to the State of Virginia; and that the fourth instruction "*embraces in terms that proclamation.*"

We repeat what we have already said in reference to the proclamations of 15th and 19th April; and now have to add that when it is asserted that the proclamation of 27th April is, in terms, involved in the fourth instruction, the counsel has committed *a grave error.* No such proclamation is referred to.

But what if it was referred to? All that is directed, in reference to Virginia, is an *efficient blockade of its ports.*

SECOND. The court was asked to instruct the jury on a state of facts which had no existence in the case before it.

The instructions all turned on the assumed fact that McVeigh had left Alexandria "*with the intention of returning thereto.*"

On what principle was the counsel justified in asking for these instructions, when the only evidence given in the case showed that McVeigh left with the "*intention not to return?*"

Or, in asking the court to pass upon the validity of the ordinance of secession, assuming that McVeigh was in the Confederate lines "in obedience to the Virginia ordinance of secession," there being no evidence on which to rest this assumption.

But, again, what "title, right, privilege, or immunity," under the authority of the United States, was claimed for the bank, and denied to it?

The instructions assume that the bank was bound to give the notice at the maturity of the notes, and then request

the charge that the proclamations *did not relieve it* from the obligation to do so.

There was here no claim for an "immunity" under any authority of the United States, such as was presented in the cases of *Matthews* vs. *McStea* and *Bond* vs. *Moore*, *supra*, in which the court maintained jurisdiction.

The notice having been given, and the sole question being as to its sufficiency, the charge given for the defendant *covered the entire case*, and the court was right in rejecting the instructions as prayed for. This practice "prevents the jury from being confused by a multiplicity of counsels, and promotes the right administration of justice."

Ruch vs. *Rock Island*, 97 U. S., 693.

Assume, however, that a Federal question was decided by the State court—what is the duty of this court in disposing of the case?

It will first inquire whether it was correctly adjudicated. If it finds it was correctly decided, the judgment will be affirmed.

If it finds it was erroneously decided, then it will further inquire whether there is any other matter or issue adjudged by the State court which is sufficiently broad to maintain the judgment of that court, notwithstanding the error in the decision of the Federal question. If this is found to be the case, the judgment must be affirmed, without inquiring into the soundness of the decision on such other matter or issue.

Murdock vs. *City of Memphis*, 20 Wall., 590.

On these well-established principles, it is submitted that if the writ is not dismissed for want of jurisdiction, the judgment must be affirmed.

The charge given by the court on the insufficiency of the notice covered the whole case. It was a correct exposition of the law, but whether correct or not, it is not reviewable here.

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